CHAI SAU YIN v. LIEW KWEE SAM

[P.C. (Lord Radcliffe, Lord Hodson and Lord Devlin) February 27, 1962]

[Privy Council Appeal No. 59 of 1960]

Rubber industry — Rubber Supervision Enactment, 1937, ss.5(i), 16(ii) & (iii), and 17(i) — Object of enactment — Licence under enactment in personal name trading under name of partnership — Whether licence includes other partners — Whether licence assignable.

Contract — Contrary to statute — Purchaser entitled to rely on own illegality.

The respondent Liew who is a rubber grower had been selling rubber to a partnership of which the appellant Chai was a member. Only one member of the partnership, Yap, held a licence to purchase rubber as required by section 5(i) of the Rubber Supervision Enactment, and none of the other partners' names were inserted in the licence as prescribed in the form scheduled to the rules made under the enactment. On a claim by Liew for the balance of the price of rubber sold, two of the partners, including Yap, the licence holder, submitted to judgment, so that the action was tried throughout as between Liew and the appellant. The appellant contended that by section 16(ii) & (iii) of the enactment the licence was personal to Yap and not assignable and did not cover the partnership, and that any purchase by him (the appellant) was prohibited by the enactment and therefore illegal and unenforceable. The learned trial judge gave judgment for Liew for $5,097.42, [1959] M.L.J. 83 and his decision was upheld by the Court of Appeal [1960] M.L.J. 122. On appeal to the Privy Council,

Held: (1) a licence under the Rubber Supervision Enactment is personal and not assignable and the actual licensee must be identified. A partnership cannot be licensed whoever the partners may be because changes in the partnership are likely to occur and cannot be controlled unless the partners are individually named in the licence;

(2) the purposes of the enactment are wider than those which have been called mere revenue enactments and are intended to ensure the carrying on of an industry on which the prosperity of the country is to some extent dependent. As the purchase of rubber in this case was made by the partnership, and, the partnership not having been licensed as required by the enactment, the purchase was prohibited by law and therefore the appellant was entitled to rely on his own illegality.

Decision of the Court of Appeal [1960] M.L.J. 122 reversed. Appeal allowed.

Cases referred to:—

(1) *In re Mahmoud & Ispahani*, [1921] 2 K.B. 716.
(2) *Brown* v. *Duncan*, 109 E.R. 385.
(3) *Gordhandas Kessowji* v. *Champsey Dossa & Ors.* (1921), Printed Papers in Appeal, Vol. 18 Judgment No. 72; A.I.R. 1921 P.C. 137.

PRIVY COUNCIL.

Dingle Foot, Q.C. (*Joseph Dean* with him) for the appellant.

Alan Garfitt for the respondent.

The judgment of the Board was delivered by, —

Lord Hodson: This is an appeal from the judgment dated 20th June, 1959, of the Court of Appeal of the Supreme Court of the Federation of Malaya sitting at Kuala Lumpur which dismissed the appellant's appeal from a judgment of the High Court at Seremban whereby the respondent as plaintiff obtained judgment against the appellant for $5,097.42.

The appellant was the second of four defendants who were sued for the price of smoked sheet rubber sold and delivered to them as persons trading under the style of Tong Seng Rubber Company.

The first defendant Yap Seow Leong submitted to judgment as also did the third defendant while the fourth who was out of the jurisdiction was not served so that the contest was between the respondent and the appellant.

The Malayan rubber industry has long been controlled by Statutes of which the Rubber Supervision Enactment, 1937, is that chiefly relevant to this appeal and will be referred to as the enactment. Dealers in rubber are required to hold a licence. The appellant never held one and has pleaded that any purchase of rubber by him was prohibited by the enactment and therefore illegal. He was a partner in Tong Seng Rubber Company but the only partner who held a licence was Yap Seow Leong the first defendant. He it was who bought the rubber and the appellant contends that the licence issued to Yap Seow Leong was personal to him and did not cover the partnership. Yap Seow Leong had been carrying on business as a rubber dealer before the war and started again at the end of 1945 with a rubber dealer's licence for himself alone trading as Tong Seng Rubber Company. On the 14th January, 1946, a partnership was formed which included all the defendants and by the terms of the partnership agreement Yap Seow Leong was to manage the business.

The respondent who is a rubber grower had been selling rubber to the partnership for years down to and including the year 1951. He knew that Yap Seow Leong had a licence and had partners but took no steps to find out whether any of the partners' names were included in the licence. The sales of rubber on which the plaint is founded all took place in 1951 and unless the contracts of sale made by the respondent with the partnership were illegal the respondent is entitled to succeed.

If on the other hand the contracts were prohibited by law and the prohibition was made in the public interest, no claim can be entertained: "The Court must enforce the prohibition even though the person breaking the law relies upon his own illegality." See *In Re Mahmoud and Ispahani* [1], *per* Scrutton L.J. at page 729.

The relevant provisions of the enactment are these:

By section 5(i) . . . no person shall purchase, treat or store rubber or pack rubber for export unless he shall have been duly licensed in that behalf under this enactment.

By section 5(ii). Every licence shall be in the prescribed form . . . . .

By section 15(i). Licensees may be required to enter into recognisances as a condition precedent to the issue of a licence.

By section 16(ii). No licence shall be assignable.

By section 16(iii). A licence is personal and (subject to certain saving provisions) lapses and becomes void on the death mental disorder or bankruptcy of the licensee.

By section 17(i). Two or more persons carrying on business in partnership shall not be obliged to obtain more than one licence appropriate to the circumstances in respect of which the licence is issued . . . . .

By section 19. Every holder of a licence to purchase rubber shall cause his licence to be framed and conspicuously exhibited on his licensed premises.

By section 31. Penalties for breach of the enactment were imposed.

By section 32. Power was given to make rules *inter alia* for prescribing forms and generally for carrying into effect the provisions of the enactment and such rules when published in the *Gazette* were given the force of law.

The prescribed forms for applications for a licence and for a licence to purchase rubber are contained in Schedules A and B to the Rules made and published pursuant to section 32 of the enactment. The form of licence contains a space in which it is indicated that the names of partners if any are to be stated. No partners' names were inserted in the licences issued to Yap Seow Leong. The licence for the year ending the 31st December, 1951, like its predecessors, authorised Yap Seow Leong trading under the style of Chop Tong Seng Rubber Coy. to purchase rubber, etc. The licence was exhibited in Yap Seow Leong's shop. The learned trial judge found himself able to reject the defence of illegality on two grounds. First, he found that this was a case where the object of the legislature in imposing a penalty was merely the protection of the revenue so that the enactment should not be construed as prohibiting the act in respect of which the penalty was imposed. He relied on the judgment of Lord Tenterden C.J. in *Brown* v. *Duncan* [2] where Lord Tenterden distinguished between breach of revenue enactments where there had been no fraud on the revenue and breaches of the provisions of Acts of Parliament which have for their object the protection of the public.

Their Lordships agree with Thomson C.J. who upon the hearing of the appeal rejected the argument based on the case of *Brown* v. *Duncan* and accepted the contention of counsel for the appellant that the purposes of the enactment are wider than those which have been called mere revenue enactments and are intended to ensure the carrying on of an industry on which the prosperity of the country is to some extent dependent.

The learned trial judge relied in the alternative on the proposition that where money is paid for an illegal purpose it may be recovered. This proposition will not assist the respondent for there is no question of recovering or returning the rubber and if the contracts are illegal he cannot obtain the assistance of the Courts to obtain the price fixed by them.

In the Court of Appeal Thomson C.J. with whom Syed Sheh Barakbah J. agreed upheld the trial judge's conclusion on the ground that the sales of rubber were made not to the partners but to Yap Seow Leong personally so that the obligation to pay for it arose from the position that the duly licensed purchaser was the agent of the partners and no more. Even if this were to provide a maintainable distinction in law their Lordships are of opinion that the conclusion is not supported by the evidence which is consistent only with the dealings in rubber having been entered into by the partnership.

Neal J. in the same Court held that the requirements of section 17(i) were satisfied by the one licence issued to Yap Seow Leong and this must be taken to be a licence to the partnership and not a licence to the individual licensee alone.

It is true that the licence authorised Yap Seow Leong trading under the style of Chop Tong Seng Rubber Coy. to purchase rubber, etc., and that Tong Seng Rubber Coy. is the name of the partnership but this does not mean that the partners' names can be read into the licence or that in the result the partnership as such was licensed to purchase rubber.

The provisions of the enactment which have already been referred to showing that the licence is personal and not assignable are consistent only with the view that the actual licensce must be identified. One does not readily conceive the idea of a partnership being licensed whoever the partners may be. Changes in the make up of the partnership are likely to occur and cannot be controlled unless the partners are individually named in a licence. The language of section 17 itself points in the same direction. The "circumstances in respect of which the licence is issued" referred to in the section would appear to relate to the type of licence for which application is made, that is to say, for the purchase treatment or storing or packing of rubber for export rather than to the circumstances of a particular partnership. Neal J. found support for the respondent in a decision of the Privy Council in the case of *Gordhandas Kessowji* v. *Champsey Dossa & Ors.* [3]. This decision is shortly stated and the learned judge as he pointed out had no access to the record or the relevant Act. These, their Lordships have seen and from their perusal of them have formed the opinion that no decision was given which is relevant to this case. The question there decided was whether an agreement contained a provision for the alienation of the privilege of manufacturing salt granted by a licence under the Bombay Act II of 1890 not whether such a provision would have been valid notwithstanding a prohibition contained in the Act.

Their Lordships are of opinion that here there is no escape from the conclusion that the appellant is entitled to rely upon his own illegality in respect of the purchase of rubber from the respondent in view of the prohibition imposed by section 5(i) of the Enactment which forbids the purchase of rubber without a licence.

Accordingly they will report to the Head of the Federation of Malaya as their opinion that the appeal should be allowed and the action dismissed and that the respondent should pay the costs incurred in the High Court and in the Court of Appeal and the costs of this appeal.

Appeal allowed.

Solicitors: *Graham Page & Co.; Sydney Redfern & Co.*